85-1568 (1)

No.

Supreme Court, U.S.
FILED
MAR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

RANDOLPH ARTIS, SERGEANT, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BROOKS B. LA GRUA
Colonel, Judge Advocate General's Corps (JAGC)
United States Army
USALSA-DAD
Nassif Building
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

ARTHUR L. HUNT
Lieutenant Colonel, JAGC
Appellate Defense Attorney

BERNARD P. INGOLD
Captain, JAGC
Appellate Defense Attorney

JERRY W. PEACE
Major, JAGC
Appellate Defense Attorney

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QUESTION PRESENTED

WHETHER petitioner's impaired mental, physical and emotional condition rendered his statements and consent to search involuntary.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

RANDOLPH ARTIS, SERGEANT, UNITED STATES ARMY,
PETITIONER

v.

THE UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Randolph Artis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at ____ M.J. ____ (CMA 1986) (Appendix A). The opinion of the Army Court of Military Review is unpublished, CM 444056 (ACMR 17 Jun. 1985) (Appendix B).

JURISDICTION

The judgment of the Court of Military Appeals was entered on February 4, 1986, affirming petitioner's conviction dated January 31, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1259.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Amendment IV: "The right of the people to be secure

in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, . . .

Amendment V: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The Uniform Code of Military Justice provides:

Article 31, 10 U.S.C. § 831 (1982):

"(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

. . . .

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial."

Military Rule of Evidence 304(e) provides:

"(e) *Burden of proof.* When an appropriate motion or objection has been made by the defense under this rule, the prosecution has the burden of establishing the admissibility of the evidence. . . .

(1) *In general.* The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. . . .

. . . .

(3) *Derivative evidence.* Evidence that is challenged under this rule as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence either that the statement was made voluntarily or that evidence was not obtained by use of the statement."

STATEMENT OF THE CASE

On September 17, 1982, the body of Joan Artis was found on Fort Campbell, Kentucky (R. 658-66). During their

investigation, Criminal Investigation Division (CID) agents learned that petitioner had made telephone calls to various friends of his wife trying to locate her (R. 667). When petitioner was informed of his wife's death he became extremely emotional (R. 668). The petitioner went with CID special agents (SA) Myers and Griffiths to the CID office and was then taken to the morgue where, upon viewing his wife's body, he again became emotionally upset and continuously cried during the return trip to the CID office (R. 671). Upon arrival at the CID office, petitioner was apprehended and advised of his fifth amendment, Article 31[1] and *Miranda*[2] rights. The rights advisement took two to three times longer than usual because of the petitioner's emotional condition (R. 86-87). The petitioner finally gave affirmative verbal responses when asked if he understood his rights (R. 113). After a three-and-one-half hour interview, petitioner signed a written statement (Prosecution Exhibit 2) and consented to a search of his living quarters and automobile. The defense moved to suppress this confession and objected to the consent to search and its fruits as derivative evidence (R. 98).

The evidence presented during the suppression motion established that the agents knew prior to interrogating the petitioner that he had previously attempted suicide. They feared he might attempt suicide again and consciously kept their weapons out of petitioner's sight (R. 266-67).

The interview was described by Agent Myers as "very low-key," meaning "very quiet" (R. 91). The petitioner's emotional state varied. He would cry and become upset when he talked about hitting his wife, and the agents several times gave him time to calm down (R. 91-92). He never refused, however, to answer to any questions, nor did he indicate any desire to stop the interrogation (R. 269).

During the interrogation, the petitioner refused to use the word "kill" when discussing his actions, but adopted its use in the prepared statement (R. 267-68). The appellant was described by SA Griffiths as visibly upset during 30 percent of the interview (R. 269). Special Agent Griffiths consciously

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[1] Article 31, UCMJ, 10 U.S.C. § 831 (1982).
[2] Miranda v. Arizona, 384 U.S. 436 (1966).

took advantage of petitioner's emotional state by using a sympathetic interview technique (R. 275). Special Agent Myers testified that he was about two feet from the petitioner while interrogating him and occasionally their hands and knees touched as they talked (R. 115).

Several persons who saw the petitioner during the 48 hours following his release from the CID office testified as to his confused and disoriented behavior (R. 138, 148, 167-177, 190-192, 375-383). At the detention facility petitioner was observed sitting in his cell, rocking and bobbing back and forth for fifteen minutes at a time, followed by ten minutes of outbursts of crying (R. 139). The petitioner's commander saw petitioner on September 17th and described him as upset. The commander had difficulty obtaining information from the petitioner and concluded that his condition made him "unfit for any kind of duty at that time" (R. 381).

Staff Sergeant (SSG) Hanna, the military police desk sergeant on September 17, 1982, described petitioner as looking like the patients in the psychiatric ward (R. 190). Because of petitioner's past suicide attempt and his apparent emotional state, he was placed under a suicide watch in a high security cell (R. 380). A guard testified that when petitioner first arrived in the facility, "we couldn't really communicate with him" (R. 148). From September 17th until September 20th, the petitioner's request for clothing was denied and he was forced to wear only underwear in a cold cell (R. 138-39). The bedding for his cot consisted of two mattresses – one to lie on and one to use as a cover (R. 144-45).

On September 19th, SA Myers and SA Griffiths went to the detention facility and, after properly advising petitioner of his rights, reinterviewed him. Petitioner again admitted he committed the offense.

Captain (CPT) Curry, the Chief of the Mental Hygiene Clinic, who interviewed the petitioner on September 20th, testified petitioner's judgment was impaired and had been impaired since September 17th (R. 170-171). He believed petitioner was intellectually able to comprehend a rights advisement, but might not appreciate the full ramifications of such advice (R. 177).

The only expert witness testifying, Dr. (MAJ) Moffett, the Chief of Psychiatry at Fort Campbell, testified that petitioner was unable to make important decisions freely and

intelligently from September 17th to 19th (R. 289). Dr. Moffett diagnosed petitioner as suffering from a mixed personality disorder with depressive and paranoid features and an adjustment disorder (R. 290). The petitioner's adjustment disorder was "more debilitative" than simply a bad reaction to an unhappy event; that is, his responses to situations would be over and above the "normal" reaction (R. 292).

REASONS FOR GRANTING THE WRIT

In order for an accused's statements given to the police during interrogation to be used against him, the government must prove that those statements were voluntary after proper advice as to the right to counsel and the right to remain silent. *Miranda v. Arizona*, 384 U.S. 436 (1966). The government must meet this burden by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477 (1972), Military Rule of Evidence 304. The military judge in the instant case erroneously determined that the government met this burden despite the overwhelming evidence establishing that petitioner's mental, emotional, and physical condition when interrogated was such that he was incapable of understanding the significance of events occurring around him and was in no condition to voluntarily, knowingly and intelligently make any important decision, especially a decision to waive precious constitutional rights.

I. PETITIONER'S STATEMENTS AND CONSENT TO SEARCH WERE INVOLUNTARY

The evidence adduced during the hearing on the motion to suppress conclusively established, *inter alia*, that the petitioner suffered from two mental disorders; that he had previously attempted to commit suicide; that he was unable to comprehend either the purpose of his apprehension or the rights warnings; that he was so emotionally distraught upon learning of his wife's death that he had to be placed for two days under a suicide watch; that he failed at times to understand even the simplest questions; that his abnormally passive personality prevented him from asserting his constitutional rights; and that he was incapable of making important decisions at the time he agreed to waive his rights.

This Court has long made it clear that an invalid confession need not be the result of torture or otherwise abusive police techniques. It is the "totality of the circumstances" which must be examined to determine whether the confession is the product of an affirmative choice by the accused. *Fikes v. Alabama*, 352 U.S. 191, 198 (1957). The issue is not one of possible falsity, although reliability of the contents of a confession is a consideration, but rather one of due process. As this Court stated over forty years ago, "The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false." *Lisenba v. California*, 314 U.S. 219, *reh. den.* 315 U.S. 826 (1941). *Accord, Michigan v. Tucker*, 417 U.S. 433, 448, n.23 (1974). Fundamental fairness is violated when a mentally incompetent person is convicted and condemned on the basis of his own words, "his will . . . overborne by the pressures and circumstances swirling around him." *Jurek v. Estelle*, 623 F.2d 929, 937 (5th Cir. 1980) (*en banc*), *cert. den.* 450 U.S. 1001 (1981), *reh. den.* 451 U.S. 1011 (1981).

The instant case is not one where "mere emotionalism and confusion" are alleged to have led to an involuntary confession. *Cf. Sullivan v. Alabama*, 666 F.2d 478, 483 (11th Cir. 1982). Clearly, mental difficulties alone, absent some indication that the alleged problems prevented a free and intelligent choice by the accused, are not enough to render a confession inadmissible. *Vance v. Bordenkircher*, 692 F.2d 978 (4th Cir. 1982), *cert. den.* 464 U.S. 833 (1983). The evidence in the instant case demonstrates clearly that the petitioner was "severely impaired" (R. 289) in making rational choices when the "sympathetic" (R. 275) agents persuaded him to confess and consent to a search. Significantly, even SA Myers admitted to Dr. Moffett that he thought medical treatment might be necessary prior to questioning (R. 299). A more compelling indication of appellant's lack of competence could hardly be found. However, SA Myers failed to heed his own misgivings about questioning petitioner and consciously overlooked petitioner's distraught, disoriented, and confused condition.

Major Wyatt described petitioner as unfit for "any" duties after the CID questioning (R. 381). Fitness for military duty despite reduced mental capacity was one factor relied upon in *Blake v. Zant*, 513 F.Supp. 772, 790-91 (S.D. Ga. 1981) in ruling a confession voluntary. At best, the petitioner in the instant case can be said to have had only a fragmented understanding of his rights. The only expert testimony showed that the petitioner was unable to concentrate, to appropriately focus his attention on his situation, or even to recognize the significance of his apprehension and interrogation (R. 289, 298-300). This expert opinion was unrebutted.

The instant case is similar in its evidentiary posture to *Henry v. Dees*, 658 F.2d 406 (5th Cir. 1981), where a mentally retarded defendant represented by counsel agreed to take a polygraph examination. The results were to be used by the prosecutor to dismiss any apparently unfounded charges. The examiner, after confronting the defendant with results indicating deception, elicited a confession. The appellate court determined that the federal district court should have granted a *habeas corpus* petition because, under the circumstances, the confession was involuntary. Specifically, the court relied heavily on the uncontradicted expert evidence which, as in the instant case, showed that it was "unlikely" the defendant understood the extent of his waiver of rights. *Id.* at 411. The court, noting that special precautions should be taken in questioning defendants with apparent mental incapacities, wrote:

> It must be painstakingly determined that they comprehend what events are transpiring. In addition, the presence of counsel should be assured absent an unmistakable, knowing waiver of that assistance.

Id. at 411.

In the instant case, the interrogators relied on the petitioner's ability to respond to questions and on his eventual capitulation to their interview technique as indicative of his ability to comprehend. Yet those same agents were aware of his emotional condition and should have recognized that he could not, as a result of this obvious mental distress, adequately comprehend the events that were transpiring.

The abuse of the situation taken by the CID agents resulted in a confession no less involuntary merely because it was obtained by friendly rather than hostile interview techniques.[3] The focus in this case is not whether there was purposeful police misconduct or whether actions taken in bad faith led to petitioner's statement. The inquiry is whether on September 17, 1982, the petitioner had the mental capacity necessary to intelligently relinquish or abandon his fundamental rights. *See Johnson v. Zerbst*, 304 U.S. 458 (1938).

Further, petitioner's statement on September 19th (Prosecution Exhibit 6) was as involuntary as the September 17th statement. Petitioner was kept in a cold, barren cell. He was allowed only his underwear. He showed no signs of improvement until after his talk with CPT Curry on September 20th. He was not given any medical attention or legal advice. It was incumbent upon the government to prove that by September 19th the petitioner had recovered from a debilitating emotional crisis sufficiently to enable him to voluntarily and intelligently waive his rights and intelligently make decisions. No evidence on this issue was presented. According to the unrebutted testimony of Dr. Moffett, petitioner's ability to make decisions during the entire time was impaired (R. 289).[4]

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[3] As Chief Justice Warren wrote in the unanimous opinion of *Blackburn v. Alabama*, 361 U.S. 199 (1960), "the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Id.* at 206. This Court did not find compelling the evidence that during Blackburn's confession he " 'talked sensible', was clear-eyed, and did not appear nervous." *Id.* at 209. The Court looked for, but could not find, any way that this evidence proved competence.

[4] Assuming, *arguendo*, that petitioner could be deemed to have been competent at the time of the second statement, it is nonetheless inadmissible because it was the direct result of the September 17th statement. This issue was not separately litigated at trial. All parties appeared to consider the second statement as derivative of the first, since the appellant was *not* warned that the first statement could not be used. *See* United States v. Bayer, 331 U.S. 532 (1947), Williams v. United States, 328 F.2d 669 (5th Cir. 1964), and United States v. Kruempelman, 21 M.J. 725 (ACMR 1985). Oregon v. Elstad, 105 S.Ct. 1285 (1985), is not applicable because the first statement in this case was not voluntary.

II. PETITIONER WAS PREJUDICED BY THE RULING OF THE COURT BELOW

The extent of prejudice must be considered to determine whether a rehearing should be ordered. A rehearing is required because the government relied almost exclusively on the petitioner's statements to prove criminal intent. There is no possibility that the detailed confessions were unimportant to the members. *Bumpers v. North Carolina*, 391 U.S. 543 (1968). The error in admitting Prosecution Exhibits 2 and 6 was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

Much of the physical evidence was obtained after petitioner gave his consent to search. The physical evidence obtained during the entire search should have been suppressed because his consent to search was invalid for the same reason as his confessions.[5] The agents testified that as soon as the petitioner provided information concerning the location of items, that information was relayed by radio to agents at the scene (R. 96; 124; 210; 242). In these circumstances, where the evidence found during the searches is so inextricably tied to the involuntary confession, and was used by the government extensively to prove its case, due process demands exclusion of all evidence obtained as a result of the confession. *See Brewer v. Williams*, 430 U.S. 387, *reh. den.* 431 U.S. 925 (1977).

CONCLUSION

For the foregoing reasons, including the importance of the constitutional issue involved, and the fact that the Court

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[5] The doctrine of "inevitable discovery" was suggested by the trial counsel as a possible basis for the admission of the physical evidence even if the confession were to be ruled involuntary (R. 415-16), relying on United States v. Kozak, 12 M.J. 389 (CMA 1982). *Kozak*, however, involved a case where the government *proved* the inevitability of the discovery of the challenged evidence. The issue was not litigated at trial with this theory in mind. Should any questions exist as to whether any of the challenged evidence would have been discovered regardless of petitioner's statements, that is a matter for the government to prove at a new trial. *See* Brewer v. Williams, 430 U.S. at 407, n. 12.

of Military Appeals, without final brief or oral argument, decided the instant case in a manner which conflicts with the applicable decisions of this Court, the petition for certiorari should be granted. The question presented is substantial and of crucial public significance.

Respectfully submitted,

BROOKS B. LA GRUA
Colonel, Judge Advocate General's Corps (JAGC)
United States Army
USALSA-DAD
Nassif Building
Falls Church, VA 22041
(202) 756-1807
Counsel of Record

and

ARTHUR L. HUNT
Lieutenant Colonel, JAGC
Appellate Defense Attorney

BERNARD P. INGOLD
Captain, JAGC
Appellate Defense Attorney

JERRY W. PEACE
Major, JAGC
Appellate Defense Attorney

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 52893/AR
CMR Dkt. No. 444056

UNITED STATES, APPELLEE

v.

RANDOLPH ARTIS (220-72-1138), APPELLANT

ORDER

On consideration of the petition for grant of review of the decision of the United States Army Court of Military Review, it appears that appellant has demonstrated good cause for this Court to grant review; however, our review of the record of trial and the pleadings filed herein convinces us that there was no error which materially prejudiced the substantial rights of appellant. Accordingly, it is by the Court, this 4th day of February, 1986,

ORDERED:

That said petition is hereby granted; and

That the decision of the United States Army Court of Military Review is affirmed.

For the Court,

/s/ JOHN A. CUTTS, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (PEACE)
Appellate Government Counsel (BURNETTE)

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 444056

UNITED STATES, APPELLEE

v.

SERGEANT RANDOLPH ARTIS, 220-72-1138,
UNITED STATES ARMY, APPELLANT

101st Airborne Division
(Air Assault) and
Fort Campbell

F. Bright, Jr.,
Military Judge

BEFORE MARDEN, PAULEY, and WERNER, Appellate Military Judges.

Captain Donna Chapin Maizel, JAGC, argued the cause for the appellant. With her on the brief were Colonel William G. Eckhardt, JAGC, Lieutenant Colonel William P. Heaston, JAGC, Lieutenant Colonel Arthur L. Hunt, JAGC, Major Robert M. Ott, JAGC, Major Edwin D. Selby, JAGC, Captain Kenneth G. Gale, JAGC, and Captain Joel R. Maillie, JAGC.

Captain John F. Burnette, JAGC, argued the cause for the appellee. With him on the brief were Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, and Captain Robert C. Erickson, Jr., JAGC.

17 June 1985

MEMORANDUM OPINION

WERNER, Judge:

Appellant was convicted, contrary to his plea, of premeditated muder of his wife in violation of Article 118, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 918 (1976). He was sentenced to be dishonorably discharged, to forfeit all pay and allowances, and to be put to death.[1]. The convening authority approved the sentence.

Appellant contends, *inter alia*, that two incriminating statements he made to criminal investigators were inadmissible because the government failed to meet its burden of proving he was mentally competent to effect a knowing and intelligent waiver of his constitutional right to the assistance of counsel or to understand that he could remain silent altogether. Additionally, he contends that the physical evidence derived from those statements should have been suppressed.

Our consideration of the extensive briefs, the record of trial, and the oral arguments of the parties concerning two of the eight assignments of error, leads us to conclude that the findings and sentence, as modified in our decretal paragraph, are correct in law and fact and that no error materially prejudicial to the substantive rights of appellant was committed.

I.

During the early morning hours of 17 September 1982, Specialist Four William Carless discovered the nude body of a woman on Range Road, Fort Campbell, Kentucky. He ob-

[1] In light of the ruling in United States v. Matthews, 16 M.J. 354 (CMA 1983), affirmance of the death penalty in this case is impermissible. We will modify the sentence in our decretal paragraph.

served a plastic garbage bag next to the woman's head that contained a blood-soaked cloth hanging out of the bag. He also noticed that there was blood coming from the back of the woman's head and also from her mouth. Carless checked the body for vital signs and detecting none, left the area to report finding the body. Then he returned to Range Road after making his report and stayed until Criminal Investigation Division (CID) agents arrived. The agents took a statement from Carless, processed the crime scene and took the body to the morgue.

Because there was no identification found on or around the body, the woman was not identified until 0930 hours. At that time, the woman was identified as Joan Artis. While CID agents were attempting to contact appellant to notify him of his wife's death, they discovered that he had been making telephone calls to his wife's friends in an effort to locate his wife. Appellant was finally located at the military police station where Agent Myers of the CID informed him of his wife's death. Agent Myers escorted appellant to the CID office and, subsequently, with Agent Griffiths, took appellant to the morgue to identify the body of his wife. Appellant had not been apprehended nor had any interrogation taken place. Appellant was merely asked when he had last seen his wife.

After seeing his wife's body, appellant became emotionally upset and cried the entire time during the return trip to the CID office. Agents Myers and Griffiths escorted appellant to an office so that he could compose himself. Agent Myers left the office to talk with Agent Kimbrell who was coordinating the investigation. At that time, Agent Kimbrell informed Agent Myers that appellant was to be placed under apprehension for the offense of murdering his wife. The decision to place appellant under apprehension was based on a variety of factors: the discovery of tire tracks leading to the back door of appellant's quarters and blood stains on the sidewalk outside the quarters, the fact that appellant was driving an automobile normally driven by his wife, the history of domestic disturbances between appellant and his wife, and the discrepancies in the time in which appellant claimed he had last seen his wife.

At approximately 1330 hours, Agent Myers placed appellant under apprehension for the offense of murdering his wife. He advised appellant of his fifth amendment, Article 31,[2] and *Miranda*[3] rights, including the right to consult with counsel. According to Agent Myers, it took him twenty minutes to complete the rights advisement, twice as long as it normally took because the offense was so serious and appellant was so upset. Appellant indicated that he understood his rights and agreed to waive them.

The interview was lengthy, beginning at approximately 1400 hours and ending when appellant signed a written statement at 1737 hours. The agents testified that they spoke to appellant in a conversational manner and provided him with food, soft drinks and cigarettes to maintain rapport with him. One of the agents even shared his lunch with appellant. Appellant's testimony indicated that he was aware of his surroundings and knew what was happening. He testified that the agents spoke to him in a sympathetic manner.

During the interview, appellant expressed an aversion to the use of the word "kill," but admitted that he had killed his wife by hitting her three times on the head with a baseball bat. He also told the CID agents where he had hidden the baseball bat and also the location of some bloodstained items. On one occasion during the interview, appellant asked if he could get a lawyer and one of the agents replied that he could get one at that moment if he wished. Appellant decided to continue the interview and get an attorney later.

After the written statement was obtained, appellant also was asked if he would consent to the search of his quarters and of his automobile. Appellant was advised that he did not have to consent. He was advised that the consent to search was separate and apart from the waiver of rights and consent to an interview. Nevertheless, appellant consented to the search of his quarters and his automobile.

While Agent Myers was attempting to locate appellant, Agent Carlson went to appellant's quarters to conduct another aspect of the investigation. At the rear of the

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[2] Article 31, UCMJ, 10 U.S.C. § 831 (1976).

[3] Miranda v. Arizona, 384 U.S. 436 (1966).

quarters, he saw tire tracks leading to the back door along with a piece of a mop on the patio but did not immediately report his discovery. After Agent Chancellor arrived at the scene the two agents reexamined the rear of the quarters. There, Agent Chancellor also noticed the tire tracks, the mop head with what appeared to be eyebrows adhering to it, and some spots of blood. At that juncture, Agent Carlson called the CID office and related what had been found. He was told to secure the crime scene to ensure that nothing was disturbed.

During their questioning of appellant, the agents at the CID office and the agents at appellant's quarters were in constant radio contact with each other. When appellant revealed that there were blood-stained items in the trash cans behind the quarters, Agents Carlson and Chancellor were directed to search the trash cans where they found the items. The interior of the quarters and the car were not searched until after appellant gave his consent.

After completion of the interview, appellant was taken to a detention cell at the military police station where he was visited by his commander, Major Wyatt. Major Wyatt observed that appellant was in an emotional state and somewhat slow to respond to his inquiries, but knew his (Major Wyatt's) identity. Later that evening, appellant was transferred to and confined in the Installation Detention Facility (IDF). Because appellant had attempted to commit suicide several months earlier, he was considered a suicide risk and was placed in a segregated cell and kept under observation.

On 19 September, Agents Myers and Griffiths went to the IDF where, after properly warning appellant of his rights and obtaining his waiver thereof, they re-interviewed him. At the interview appellant again admitted he committed the offense. The substance of this interview was reduced to writing but appellant refused to sign the document although he initialed the corrections made on it.

At an Article 39a, UCMJ, session prior to trial, Major Moffett, the Chief of Psychiatry and Neurology at Fort Campbell, testified during the hearing on the suppression motions.

Doctor Moffett stated that his diagnosis was that appellant manifested personality and adjustment disorders which impaired his ability to concentrate and attend to the point that appellant could not freely and intelligently waive his rights. He believed that appellant's ability to make decisions was impaired on 17 September, although on cross-examination he appeared to retreat from the opinion. The government relied on the deficiencies in Dr. Moffett's testimony as well as the testimony concerning the circumstances involved in the taking of the two statements.

II

The first issue is whether the government failed to prove that appellant was mentally competent on 17 and 19 September 1982 as a predicate to establishing a valid waiver of his rights and the admission of his statements and the physical evidence derived therefrom. The gravamen of appellant's claim is that he was mentally, emotionally and physically incapable of freely and voluntarily waiving his rights before confessing to killing his wife. Conversely, the government asserts that the evidence of record proves that appellant voluntarily waived his rights and relies on the detailed findings of fact made by the military judge as support.

Military Rule of Evidence (hereinafter referred to as Mil.R.Evid.) 304 delineates the rules governing the admissibility of inculpatory extrajudicial statements of an accused. As is generally the case under the Military Rules of Evidence, when a party wishes to exclude evidence, he must object in a timely manner, stating the specific ground for his objection. Mil.R.Evid. 103(a)(1). The government then has the burden of proving by a preponderance of the evidence the admissibility of the statement. *See* Mil.R.Evid. 304(d)(2), 304(e) and 304(e)(1). *See also United States v. Bell*, 7 M.J. 108 (CMA 1979); *United States v. Teeter*, 12 M.J. 716 (ACMR 1981), *aff'd in part, rev'd in part*, 16 M.J. 68 (CMA 1983). At trial, appellant objected to the admission of his statements of

17 and 19 September 1982 on the grounds they were involuntarily given, thereby raising this issue, shifting the burden of proof to the government, and preserving his right to appeal an erroneous ruling. The standard to determine if a statement is involuntary as outlined in Mil.R.Evid. 304(c)(3) is:

> A statement is "involuntary" if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States, Article 31, or through the use of coercion, unlawful influence, or unlawful inducement.

The question of the voluntariness of appellant's confession is primarily factual, and its answer depends in part on the credibility of the witnesses who testified with respect to the motion to suppress. We recognize that the military judge saw and heard the witnesses and was in the best position to evaluate their credibility. Article 66, UCMJ, 10 U.S.C. § 866 (1976).[4] We agree with the trial judge and find that appellant's statements were voluntary and therefore properly admissible.

We find the circumstances surrounding appellant's questioning were not encumbered by coercion, unlawful inducements or physical or mental abuse so as to render his confession involuntary. Appellant testified that the agents spoke to him in a sympathetic tone but maintains that is what made him gradually change his denial of guilt into a confession. *See United States v. Schuring*, 16 M.J. 664 (ACMR 1983), *pet. denied*, 17 M.J. 287 (CMA 1984). The testimony of the CID agents, on the other hand, established that appellant received proper warnings and that his decision to proceed with the interrogation was uncoerced by anything other than the dictates of a guilty conscience. *See United States v. Wheeler*, 18 M.J. 823 (ACMR 1984). We find the agents' testimony credible.

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[4] We commend the military judge for the detailed findings on fact on the issue.

We also find that appellant was mentally competent to effect a knowing and intelligent waiver of his constitutional rights. Doctor Moffett diagnosed appellant as having personality and adjustment disorders which impaired his ability to concentrate and attend to the point that appellant could not freely and intelligently waive his rights. Merely having a diagnosed character or personality disorder does not equate to a lack of mental responsibility. *See United States v. Fleming,* 23 CMR 7 (CMA 1957); *United States v. Jones,* 45 CMR 697 (AFCMR 1972); *United States v. McMahon,* 4 M.J. 648 (AFCMR 1977). Evidence showing no more than a behavioral abnormality does not provide a foundation for a defense of lack of mental responsibility. *See United States v. Sudler,* 2 M.J. 558 (ACMR 1976), *aff'd,* 6 M.J. 82 (CMA 1978). *See also United States v. Cortes-Crespo,* 13 M.J. 420 (CMA 1982). Under the circumstances we do not believe that appellant's claim of mental incapacity has merit. Doctor Moffett testified that appellant merely had personality disorders. The CID agents who took the statement from appellant testified that at times during questioning, appellant became emotionally upset. We find, as did the military judge, that appellant was mentally competent to affect a knowing and intelligent waiver of his rights; consequently, appellant's statement of 17 September was voluntary and properly admitted.

We further find that appellant's statement of 19 September was voluntary. Appellant agreed to an interview after a proper rights advisement. He neither requested an attorney nor requested that the interview be terminated. There were no unlawful inducements.

III

In view of our opinion that appellant's statements of 17 and 19 September 1982 were voluntary, we find that the derivative evidence obtained as a result of appellant's revelation to the CID agents was not tainted and was therefore admissible. Moreover, we find by clear and convincing evidence that appellant voluntarily consented to the searches. Mil.R.Evid. 314(e)(5). Appellant was advised that he did not have to consent to the search of his automobile or his quarters

even though he had earlier consented to an interview. He nevertheless consented to the search of both his quarters and his automobile.

Assuming, *arguendo,* that there was a taint which would preclude the admission of the evidence derived as a result of appellant's statement of 17 September, some of the evidence still would be admissible under the plain view doctrine. *See Coolidge v. New Hampshire,* 403 U.S. 443 (1971). *See also* Mil.R.Evid. 316(d)(4)(C). The CID agents were legitimately conducting part of the murder investigation at appellant's quarters when they noticed blood stains, mop fragments and tire tracks. Moreover, the rest of the evidence would have been inevitably discovered as a result of further CID investigation. *See United States v. Kozak,* 12 M.J. 389 (CMA 1982).

IV

Appellant additionally contends that the evidence is insufficient to prove beyond a reasonable doubt that he was "sane at the time he killed his wife." We disagree. The military judge properly instructed the court members concerning all relevant issues regarding the mental responsibility question, to include partial mental responsibility as it related to premeditation and intent. Implicit in the court's findings of guilty was its disbelief in appellant's mental responsiblity defenses. The court members as triers of fact had the superior position to see and hear the witnesses and to determine the issue submitted to them. We should not lightly disregard their determination. *United States v. Collier,* 1 M.J. 358 (CMA 1976). In this case we find as they did.

We have considered the other errors raised by appellant and find them to be without merit.

The findings of guilty are affirmed. Only so much of the sentence as provides for a dishonorable discharge, total forfeitures and confinement at hard labor for life is affirmed.[5]

Senior Judge MARDEN and Judge PAULEY concur.

FOR THE COURT:

WILLIAM S. FULTON, JR.
Clerk of Court

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[5] United States v. Matthews, 16 M.J. 354 (CMA 1983).